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ABSTRACT

The basic requirements for fair school disciplinary proceedings were set down in the Supreme Court decision of Goss v. Lopez. The requirements are that students be given oral or written notice of both the nature of the rule (violation of which will result in punishment) and the nature of the specific violation and the intended punishment. In addition, the accused student must be given an opportunity to "tell his side of the story" to the person who proposes to mete out the punishment. If the student denies the charges, an explanation must be given of the evidence of the violation upon which the school authority is relying. If these basic principles of fairness and due process in the school context are understood and followed, there should be few legal challenges to school disciplinary procedures. (Author/MLF)

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A Legal Memorandum

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

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The Meaning of "Fairness" in Student Disciplinary Procedures

Introduction

Everyone agrees that the fundamental requirement of due process, whatever else it may require, is "fairness." The problem is that most people don't have a very clear idea of what that word denotes; and if they do, they are not sure if most others have the same understanding they do. The purpose of this Memorandum is to define "fairness" somewhat more clearly in the school context and with particular reference to student discipline.[1]

The most authoritative instruction on any legal subject under our system comes from the United States Supreme Court. The Court spoke out for the first time regarding student discipline in 1974 in the Ohio case, Goss v. Lopez, 419 U.S. 565. While the decision was directed specifically toward short-term suspensions, the opinion provided considerable guidance on the general concepts underlying the Court's thinking. In regard to fairness, it said:

> Having chosen to extend the right to an education...Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred.

In the years since the Goss decision was rendered it has remained for other courts to define the requirements for those elements of legal procedure which would be found to be "fundamentally fair."

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[1] Of course, fairness is not the only requirement of a good disciplinary process. For a discussion of the other requirements, see the Legal Memorandum on Student Discipline Codes dated March 1981.

Short-Term Suspensions

We have attempted to avoid the term "due process" until now because it is a difficult term to define, and therefore often bothers laymen. Basically, however, all that is meant by due process is that group of procedures which the law requires in a specific instance, and which is deemed to be fair. There is no one set of procedures which constitutes due process. Procedures vary with the circumstances. As the Supreme Court put it in a nonschool decision sometime before Goss:

> ...the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. (Cafeteria Workers v. McElroy, 367 U.S. 886, 895; 1961.)

In applying this concept in the Goss case, the Court reached the following conclusion where the suspension was for 10 days or less:

> If the suspension is for 10 days [this] is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

The Court then spelled out what it regarded as mimimum requirements for a short-term suspension:

> At the very minimum...students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.
>
> ...The student must be given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. There need be no delay between the time "notice" is given and the time of the hearing. In most cases, the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold...that the student first be told what he is accused of doing and what the basis of the accusation is.

The majority went on to say, however, that there may be situations in which prior notice and hearing cannot be mandated. Those students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. But in those cases, the necessary notice and hearing should follow "as soon as practicable." And the more serious the charge, the more careful the principal must be in ensuring fundamental fairness at every step of the procedure.

The majority stopped short of insisting that the student be given, as a matter of due process, the opportunity to secure counsel, to confront and cross-examine witnesses, or to call witnesses to verify his version of the incident. Instead, it said:

> To impose in each case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool, but also destroy its effectiveness as part of the teaching process.

On the other hand, the Court noted that requiring the principal to permit the student to tell his side of the story, "will provide a meaningful hedge against erroneous action. At least, the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect," thus reducing the chance of error.

Since the Goss decision, lower courts have dealt with many claims by students alleging denial of due process in cases of short-term suspension. In deciding these cases some of the general guidelines set down by the Supreme Court have been further refined.

Notice

Notice is one of the most important elements in any due process procedure. While notice has several possible applications, in the school setting the most important are:

1. Apprising all students of the rules, and the fact that violation will result in disciplinary action;
2. Apprising an accused student of the offense he is accused of committing and the evidence supporting the charge.

To be sure that students have been given notice of the rules, and punishments which may be invoked for their infraction, most schools now adopt written codes of student conduct which are distributed to all students. (See "Student Discipline Codes," Legal Memorandum, March 1981.) These should be as clear and specific as possible. Rules prohibiting such activities as "defiance of school authority" and "gross disorder" may be considered too vague to satisfy the notice requirement of due process. Not all rules must be written down, of course, nor even formally communicated. Acts commonly recognized as crimes—such as physical assault, theft, and the destruction of school property—can be punished even without prior notice, since even children are expected to be aware that such acts are not permissible, by the time they reach secondary school.

When a student has been accused of violating a school rule the charges must be clearly stated, especially if the offense is a serious one. In Wisconsin, for example, a federal court found inadequate notice when a school informed parents only that their son "continues to conduct himself in an irresponsible and disruptive manner" and had been "deliberately defiant of reasonable requests by teachers." (Keller v. Fochs, 385 F. Supp. 262, E.D. Wis. 1974.)

Similarly, at least in serious cases, the student should be apprised of the charges enough in advance of the hearing that he has time to prepare his defense, arrange for witnesses, and prepare statements or other evidence. There is no general legal requirement that the notice be in writing in the case of short

suspensions, but many school systems voluntarily adopt such a practice. In this, as in many other respects, schools exceed the requirements of due process to satisfy their own concepts of fairness.

Hearing

As mentioned previously, the Supreme Court made clear in the Goss case that, concerning a short-term suspension, "some kind of hearing" was required, but that this could be as informal as the circumstances would reasonably allow. In some cases this might mean nothing more than an informal apprehension of the student. The only requirements are that the student be told what rule he is accused of breaking, the evidence school authorities have of his violation, and, in the words of the Supreme Court in Goss: "an opportunity to present his side of the story." In establishing these very flexible rules, the Court went out of its way to demonstrate both its understanding and care for the educational process, and the problems of school administrators in carrying on this process. Said the Court:

> In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead, we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.

Indeed, as in the case of notice requirements, many schools have voluntarily gone beyond the simple and informal requirements set by the Supreme Court, or other federal courts since Goss. In cases of short suspensions, as well as less serious disciplinary matters such as suspension from extracurricular activities, detentions, or the like, the law does not require school authorities to provide students the opportunity to be represented by counsel, to call witnesses in their behalf, or to confront and cross-examine witnesses providing evidence against them. And, of course, they need not be afforded all of the other protections accorded defendants in criminal courts, such as remaining silent on the basis of Fifth Amendment protections against self-incrimination, or the presumption of innocence unless found guilty beyond a reasonable doubt.

Some of these protections, particularly representation by counsel, and the calling of witnesses in one's own behalf, have generally been upheld in cases involving more serious disciplinary actions, particularly expulsion or long-term suspensions, but in almost every case, these requirements have been spelled out in state statutes or school district regulations.[2]

The right to a hearing is obviously imperiled if the person or persons conducting the hearing are not impartial. This general principle of fairness, like many of the more specific rules discussed above, has usually been invoked only in expulsion or long-term suspension cases. There have been, however, a few cases in which it

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[2] In some cases, state statutes or court decisions have applied these requirements to shorter term suspensions, but these are not the rule. A New York state statute, and local court decision in Philadelphia, for example, require that representation by counsel be permitted in cases of suspensions of more than five days.

has been raised as a successful defense for less serious penalties, and it should be borne in mind by principals and other site administrators. In Michigan, for example, in a case involving a proposed disciplinary transfer, it was held to be improper for the principal who witnessed the incident upon which the charges were based to hear the case. Whenever possible, the administrator who brings a charge against a student should not decide that student's guilt or innocence, especially in a formal hearing.

Finally, of course, whoever serves as hearing officer should refrain from making any statements before hearing the student's side of the story that would indicate that the hearing officer has already made up his mind, and is merely going through the motions of providing a hearing. The teacher or assistant principal who has gathered the evidence concerning the student's offense should present that evidence, enabling the principal to sit as a fair determiner of the student's guilt or innocence. Impartiality of the tribunal, after all, is probably the cornerstone of any fair judicial proceeding.

For the same reason, hearings should be held before any disciplinary action is taken—whenever possible. The courts are aware that this is not always possible, and are willing to make exceptions where a student can reasonably be regarded as posing a continuing danger to persons or property in the school, or an ongoing threat to the educational process. In these cases, necessary notice and hearing should follow exclusion from school as soon as practicable, usually within 24 hours.

Double Jeopardy

Another element of criminal due process which is often claimed by students and parents in school disciplinary cases is that the school's proceeding places the student in "double jeopardy" because there is a pending criminal or juvenile court proceeding as well. There is no legal basis whatsoever for this claim. The double jeopardy principle concerns attempts to prosecute a person more than once in a criminal court for the same offense. It is not a bar to a person's being separately tried in an administrative proceeding for violation of a rule, even though such a rule may prohibit the same offense also prohibited by criminal law. This often occurs with offenses such as possession of drugs, assault on another student, and the like.

In such cases, neither the fact that a criminal action is pending, nor even that one has been held and the student found not guilty, is a sufficient basis for exoneration of the student on the basis of a claim of double jeopardy. Because the standards for conviction of a crime are much higher in a criminal proceeding than they are in a school disciplinary hearing, student defendants may often be acquitted in the criminal or juvenile court, and still be properly found guilty in the school proceeding. In a criminal proceeding "not guilty" does not mean "innocent," but only that the standard of proof required for a guilty verdict was not satisfied. Since the standard in a criminal court (beyond a reasonable doubt) is higher than that applied in an administrative proceeding, different outcomes may properly result.

It should be noted that a student can even be found properly guilty and punished twice—once by school authorities and once by civil authorities—if the offense is a violation both of school rules and the civil law.

Disciplining the Handicapped Student

Federal law (and sometimes related state law) places additional requirements on public school administrators attempting to discipline students classified as handicapped. Under terms of Sec. 504 of the Rehabilitation Act of 1973, and the Education for All Handicapped Children Act of 1975 (usually referred to as P.L. 94-142), children classified as handicapped must be provided with a free appropriate public education, and regulations promulgated under the authority of these laws have defined suspension from school as an exclusion in violation of the law. In such cases, at least one Federal Court of Appeals has required that specific procedures be followed.

For a student facing a possible long-term suspension, the procedures require a determination by a trained and knowledgeable team as to whether the student's misconduct is causally related to his handicap, consideration of alternative placements, notice to the parents, and an opportunity to appeal any change in the student's assignment to an impartial hearing official rather than the school board. (Emphasis added.) (S-1 v. Turlington, 635 F.2d 342; 5th Cir. 1981.) If the parent appeals, the student's placement cannot be changed while the appeal is in process unless the student's behavior is claimed to be dangerous or unless the parent consents.

Court decisions have supported school disciplinary authorities in suspending handicapped students on a short-term basis as an emergency measure, but even then educational services may have to be supplied during the term of the suspension. Other short-term suspensions may be permissible only if the school can make a clear showing that the misconduct involved was unrelated to the handicapping conditions. (Doe v. Koger, 480 F. Supp. 225, 228-229; N.D. Ind. 1979.)

Conclusions

The objective of legal requirements for all school disciplinary proceedings is to see that they are fundamentally fair without imposing an unreasonable burden upon school authorities. For long-term suspensions and expulsions, the requirements of a fair procedure are almost always set forth in state statutes and local board regulations.

For short-term suspensions, the basic guidelines were set down in the landmark decision of the U.S. Supreme Court, Goss v. Lopez. This has been amplified and spelled out in numerous state and federal court decisions in the years since the Supreme Court spoke. Generally, however, the requirements continue to be those set forth by the High Court:

1. Oral or written notice of the nature of the rule, violation of which will result in punishment.
2. Oral or written notice of the nature of the specific violation and the intended punishment.
3. An opportunity for the accused student to "tell his side of the story" to the person who proposes to mete out the punishment.
4. If the student denies the charges, an explanation of the evidence of the violation upon which the school authority is relying.

That's all that fairness means in the school context; and in that context, that is also the meaning of due process. If these basic principles are understood and followed, there should be few legal challenges to school disciplinary procedures.

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